BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KERMIT D. HERSHBERGER	)	
Claimant	)	
V.	)	
	)	
CITY OF NEWTON	)	
Respondent	)	Docket No. 1,036,644
AND	)	
	)	
KANSAS MUNICIPAL INSURANCE TRUST	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the December 12, 2014, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on April 24, 2015.

APPEARANCES

Charles W. Hess of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated claimant's average weekly wage entitled him to the maximum weekly disability benefit rate of $510. The parties agreed ALJ Klein erred by indicating respondent stipulated claimant sustained a personal injury by accident. The parties, at oral argument, indicated they would file a stipulation setting forth temporary total disability payments respondent paid claimant. Said stipulation was filed on May 20, 2015, and indicated respondent paid claimant 69.72 weeks of temporary total disability payments over several time periods at the rate of $510 per week, or $35,555.80 (June 27, 2014, was the last date claimant received temporary total disability benefits) and $23,388.60 in voluntary permanent partial disability payments from June 28, 2014, through May 14, 2015.

ISSUES

ALJ Klein determined claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on September 2, 2007. He found claimant had a 25% whole body functional impairment and was permanently and totally disabled. The ALJ did not admit or consider the affidavit of Debra Perbeck, respondent's human resources director. The ALJ largely discounted the testimony of physician assistant Jay Wedel, found opinions of Dr. David K. Ebelke and Dr. Steven L. Hendler lacked credibility, and excluded the testimony of vocational consultant Steve L. Benjamin. The ALJ awarded claimant temporary total disability and permanent total disability benefits.

Respondent contends claimant's chronic low back injuries are not related to his September 2, 2007, accident. It asserts the most credible evidence establishes that claimant's current impairment and need for treatment were not related to the alleged accident. Respondent maintains claimant is not permanently and totally disabled and is able to return to the open labor market. If compensable, respondent contends claimant has a 79.65% work disability based upon a 59.3% task loss and a 100% wage loss. Respondent contends it is entitled to a credit for a 10% preexisting impairment. Respondent asserts the affidavit of Ms. Perbeck is admissible and should be considered. If admitted, Ms. Perbeck's affidavit shows respondent made voluntary wage payments to claimant and respondent is entitled to a reduction in the award by the weekly value of the retirement benefit. Respondent argues each of the wage issues, including the fringe benefit entitlements and statutory offsets for voluntary wage payments and retirement benefits, were specifically addressed in the evidence it submitted. Respondent asserts claimant's third surgery was not necessary nor related to his September 2, 2007, injury.

Claimant contends his injuries arose out of and in the course of his employment with respondent. Claimant requests the Board affirm the ALJ's findings that he sustained a 25% whole body functional impairment and is permanently and totally disabled. Claimant maintains the ALJ was correct in not admitting or considering Ms. Perbeck's affidavit. Claimant asserts no issue of voluntary wage payments was raised before the ALJ and, therefore, that issue cannot now be argued to the Board. Claimant argues respondent failed to prove it is entitled to a reduction in benefits for a retirement offset. Claimant submits Dr. Raymond W. Grundmeyer, the surgeon performing claimant's third low back surgery, believed the surgery was reasonable and necessary. With the exception of the ALJ's finding regarding the testimony of Mr. Wedel, claimant requests the Board affirm the ALJ's December 12, 2014, Award.

The issues before the Board on this appeal are:

1. Did claimant sustain a personal injury by accident arising out of and in the course of his employment?

2. What is the nature and extent of claimant's disability? Specifically:

A. What is claimant's functional impairment?

B. Is respondent, pursuant to K.S.A. 2007 Supp. 44-501(c), entitled to a credit for a preexisting functional impairment?

C. Should the ALJ have excluded the testimony of Steve L. Benjamin?

D. Is claimant permanently and totally disabled?

E. If not, what is claimant's work disability?

3. Should Debra Perbeck's affidavit have been admitted into evidence? If so:

A. Should the Board consider the issue of whether respondent is entitled to credit for voluntary wage payments it made to claimant?

B. Should claimant's workers compensation benefits be reduced by the weekly equivalent of his retirement benefits?

4. Was claimant's surgery on April 16, 2012, performed by Dr. Raymond W. Grundmeyer reasonably necessary to cure and relieve the effects of his work injury?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant received training as a firefighter and emergency medical technician (EMT). He began working for respondent in 1990 as an EMT and later became a certified emergency medical intensive care technician (EMICT) or paramedic. Once claimant was certified as an EMICT, he was always classified in that position. He would also fill in as a firefighter when needed.

Claimant indicated that in January 2007, he went to see his family physician, Dr. Mark Hall, and Jay Wedel, PA, at Mid Kansas Family Practice for low back pain. Claimant related he injured his low back while assisting a pregnant woman who had fallen between a porch and an air conditioner. He indicated he had low back pain radiating into the left hip, but denied having leg pain. Claimant testified there was no workers compensation report filed, because respondent recommended he take care of the issue through his health insurance. Claimant underwent an MRI and three low back epidural injections.

Mr. Wedel testified he has known claimant since 1987 and claimant has been his patient for 18 years. Notes from claimant's January 3, 2007, visit with Mr. Wedel indicate

claimant was having low back pain radiating into his left hip and down the leg. Mr. Wedel indicated he was unaware of claimant having any back problems prior to 2007. An MRI was recommended, which claimant underwent at the Newton Medical Center on January 24, 2007. Claimant was referred to Dr. Bryan L. Black, who gave claimant three epidural injections – one at L3-4 on both February 15 and March 19, 2007,[1] and a left-sided L5-S1 transforaminal injection on August 16, 2007. A letter from Dr. Black to Dr. Hall dated February 15, 2007, indicated the MRI showed a small annular tear at L3-4. In a letter dated August 16, 2007, to Dr. Hall, Dr. Black indicated a review of claimant's old MRI showed degenerative changes at multiple levels along with facet hypertrophy at L5-S1 bilaterally.

Mr. Wedel indicated he would have expected the epidural injections to relieve the type and quality of claimant's pain. He also confirmed that prior to September 2, 2007, claimant never complained of pain, numbness and tingling below the hips.

On September 2, 2007, claimant and a firefighter leaned over and pulled a seizure patient from under a picnic table and placed her on a stretcher. Claimant felt some discomfort, but thought it was only a tired muscle. At the hospital, claimant, along with an EMT/firefighter, transferred the patient from the stretcher to a hospital bed using a sheet lift, in which the sheet on the stretcher is used to lift the patient. As claimant was lifting, he felt a pop or movement in his lower back and what felt like an electrical shock through the buttocks, down both legs and into the feet. Claimant went back to the station, reported the incident to a supervisor at another station and went home to rest.

Claimant, on September 4, 2007, went to see Dr. Hall. According to claimant, he was told by Dr. Hall not to work for a week and see how it went. Dr. Hall's notes indicated claimant experienced a low back strain while lifting a patient and had numbness and pain down the left leg. Claimant saw Dr. Hall again on September 10, 2007. The doctor noted claimant had no improvement and ordered an MRI. Claimant testified that medications and physical therapy prescribed by Dr. Hall did not provide any real result. Dr. Hall allowed claimant to return to light duty. September 21, 2007, notes of Maureen Entz, ARNP, also of Mid Kansas, indicate the MRI showed degenerative changes at L2-3 and L3-4, but no disc herniation or spinal stenosis. Claimant reported pain in the low back, buttocks, back of the thighs and lateral calves, with numbness in the heels.

In addition to medical treatment received at Mid Kansas in September 2007, claimant received extensive medical treatment:

- On September 27 and November 8, 2007, Dr. Black performed bilateral L5-S1 transforaminal steroid injections.

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[1] Although Dr. Black's March 19, 2007, letter to Dr. Hall referred to the injection as being given at the L4-5 level, Mr. Wedel believes Dr. Black misspoke and was referring to the L3-4 level.

- On October 5, 2007, Mr. Wedel saw claimant again and referred claimant to Dr. Ali B. Manguoglu or Dr. Raymond W. Grundmeyer for further evaluation. Claimant eventually saw Dr. Matthew N. Henry, Dr. Grundmeyer's partner.

- On November 1, 2007, claimant underwent an NCT/EMG of both lower extremities by Dr. Ty L. Schwertfeger. The doctor indicated the testing demonstrated subtle evidence of a chronic right L5 radiculopathy, but there was no electrophysiologic evidence of any acute process or peripheral neuropathy, plexopathy or myopathy.[2]

- On December 20, 2007, claimant underwent a lumbar discography/CT scan interpreted by Dr. Milton Landers.

- On February 8, 2008, Dr. Henry performed extensive low back surgery including an L3-4 decompressive laminectomy, L3-4 posterior discectomy and fusion at L3-4 with instrumentation.

- From July 25, 2008, through January 19, 2009, Dr. Xavier Ng treated claimant and referred him for epidural steroid injections.

- On September 23, 2008, Dr. Henry Beugelsdijk performed an L3-4 epidural steroid injection.

- Dr. Douglas Burton identified a failed fusion on February 18, 2009, and performed an anterior interbody fusion at L3-4.

- On February 9, 23 and March 16, 2010, Dr. Samir Fahed performed transforaminal epidural injections with fluoroscopy. On November 5, 2010, Dr. Fahed tried a trial spinal cord stimulator. The doctor, on December 7, 2010, attempted, without success, to implant a permanent stimulator.

- On January 10, 2011, Dr. Jonathan Morgan inserted a permanent spinal cord stimulator in claimant's back.

- On April 16, 2012, Dr. Grundmeyer performed an L2-3 laminectomy and an L4-5 laminectomy with nerve root decompression with L2-3 and L4-5 posterolateral fusion. The doctor removed prior L3-4 instrumentation. Dr. Grundmeyer continued treating claimant through October 16, 2012, and referred him to a physiatrist.

- Beginning December 11, 2012, Dr. David Harris, a physiatrist, treated claimant with medications and recommended aerobic exercise and therapy.

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[2] See Wedel Depo., Ex. 1.

- Claimant continues seeing Mr. Wedel on an ongoing basis. The medical records in evidence show claimant last saw Mr. Wedel on November 15, 2013.

Claimant also has been evaluated by several medical providers:

- On October 8, 2007, Dr. C. Reiff Brown, an orthopedic physician, evaluated claimant's back.

- On September 8, 2009, Dr. Michael Schwartz conducted a psychological evaluation.

- On October 5, 2009, Dr. Paul S. Stein, a neurosurgeon, evaluated claimant's low back.

- On August 17, 2010, Dr. David K. Ebelke, by order of the ALJ, evaluated claimant.

- On October 1 and 25, 2010, Dr. Michelle Abella conducted a psychological evaluation.

- On March 6, 2013, Dr. George G. Fluter, at the request of claimant's attorney, evaluated claimant's back condition.

- On April 15, 2014, Dr. Steven L. Hendler, at respondent's request, evaluated claimant's back.

Of the aforementioned medical providers, only Mr. Wedel and Drs. Ebelke, Fluter and Hendler testified.

A preliminary hearing was scheduled for June 16, 2010, to address claimant's request for medical treatment. The ALJ ordered claimant to be evaluated by Dr. Ebelke to offer opinions on diagnosis and medical treatment. Dr. Ebelke evaluated claimant on August 17, 2010. His report indicated he reviewed extensive medical records.

Dr. Ebelke reviewed claimant's January 24, 2007, MRI. He indicated the MRI revealed mild disc dehydration changes at L2-3 and L3-4, but disc heights were well maintained and there was slight bulging at most. Nerve root foramina were open at all levels. There was an annular tear at L3-4. L1-2, L2-3, L4-5 and L5-S1 looked normal.

X-rays of September 4, 2007, reviewed by Dr. Ebelke showed normal hip and SI joints. The doctor reviewed claimant's September 12, 2007, MRI and stated, "The first post-injury **MRI** of 9/12/07 to my eye looks the same as the MRI of 01/24/07."[3] According

[3] Ebelke Depo., Ex. 2 at 3.

to Dr. Ebelke, x-rays taken on October 30, 2007, showed no spondylolysis, spondylolisthesis or instability, but did show a mild anterior osteophyte at the superior aspect of L5. Dr. Ebelke opined:

> After extensive review of this case, I've reached a number of conclusions, some of which may not necessarily be relevant to why you asked me to see him. In my opinion, the original work injury was nothing more than another lumbar strain. There were no fractures, herniations, dislocations, etc. This was another flare-up of the same type of pain he'd had before; an MRI 8 months before showed the same findings. I would not have recommended surgery (decompression or fusion) based on either of these MRI scans, nor would I have recommended provocative discography. . . . An obese man with a history of depression and unexplainable lower extremity symptoms, a normal neurological exam, mild degenerative changes, and no instability would not likely benefit from fusion, regardless of discography findings. . . . However, I agree with Dr. Burton that the fusion never healed, and at that point he did need to proceed with more surgery in order to get the fusion solid. . . .
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> . . .
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> I agree with Dr. Burton that his impairment rating should be 20%, body as a whole.[4]
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> In summary, Mr. Hershberger had an unnecessary surgery, which should be considered elective in nature. This was done in an attempt to improve his pain, but ultimately failed. Although further attempts at treatment are not likely to provide what he's looking for, he should be allowed to proceed with a dorsal column stimulator if he wishes, in an attempt to get further improvement. He will probably need continuing medications and intermittent doctor visits in an attempt to manage his pain. I would not expect any need for additional surgery at L3-4, with the possible exception of removal of the instrumentation at that level. He may at some point need surgery at some of the other levels, if degenerative changes/herniations/stenosis develop at those levels. The odds of developing those changes were increased as a result of the surgery and discography; the work incident did not increase his risk for problems at any of the other levels.[5]

After receiving Dr. Ebelke's report, the ALJ, on September 8, 2010, ordered medical treatment with Drs. Hall and Fahed. At a February 7, 2012, preliminary hearing, claimant requested surgery by Dr. Grundmeyer. The ALJ reviewed medical records from Dr. Grundmeyer and Dr. Ebelke's report. The ALJ indicated Dr. Ebelke predicted claimant would need additional medical treatment and the ALJ authorized treatment and surgery by Dr. Grundmeyer.

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[4] Dr. Ebelke testified this was in accordance with the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[5] Ebelke Depo., Ex. 2 at 4-5.

Dr. Ebelke was asked by respondent to review what the doctor described as an attempted myelogram/CT of August 1, 2011. In a letter to respondent's attorney dated May 9, 2014, Dr. Ebelke indicated there was no actual myelogram, but rather a flawed study. He opined, based upon the study, he would not have recommended more surgery. The doctor looked at L2-3 through L5-S1 and explained why surgery was not necessary. Dr. Ebelke testified he also reviewed an October 27, 2011, technically good myelogram and the CT scan and they confirmed his May 9, 2014, opinions.

At the request of his attorney, claimant was evaluated by Dr. Fluter on March 6, 2013. Dr. Fluter's report indicated claimant reported having no prior trauma or injuries to the back, but had episodes of pulled muscles. Dr. Fluter reviewed claimant's medical records from September 2, 2007, thereon. He did not have claimant's prior medical records, except for a January 24, 2007, MRI report. He indicated claimant's prior medical records might impact his causation opinion. Based upon the January 24, 2007, MRI findings and comments or testimony from claimant, the doctor opined claimant had no preexisting impairment if "things resolved completely."[6] Respondent's counsel described claimant's complaints of low back pain radiating into his left hip and leg prior to September 2, 2007, and asked the doctor if that would result in claimant having a DRE Category II permanent impairment. Dr. Fluter indicated he could not say without knowing the findings.

Dr. Fluter opined there was a causal relationship between claimant's current condition and his work injury on September 2, 2007. Dr. Fluter opined that using Table 70 of the *Guides*,[7] claimant is in DRE Spine Impairment Category V and has a 25% whole person impairment. The doctor assigned claimant permanent work restrictions of:

- lifting, carrying, pushing and pulling no more than 20 pounds occasionally and 10 pounds frequently,
- bending, stooping, crouching, twisting and stair climbing only occasionally,
- avoid squatting, kneeling, crawling and ladder climbing and
- avoid prolonged sitting, standing and walking (no more than 20 minutes per hour) with an allowance to alternate activities and change positions as needed for comfort.

Dr. Fluter testified that based upon claimant's condition, restrictions and need for management of chronic medications, some of which could impact his cognitive abilities and

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[6] Fluter Depo. at 20.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

safety, claimant was not realistically capable of substantial and gainful employment. He noted claimant was taking Oxycodone, an opioid drug; Celebrex, an anti-inflammatory; Cyclobenzaprine, a muscle relaxant; Pantoprazole and Ranitidine, for preventing ulcers; Lyrica, an anticonvulsant agent; Cymbalta and Trazodone, antidepressants; and Tylenol. Dr. Fluter reviewed claimant's non-duplicative job tasks for the 15 years prior to his accident as identified by claimant's vocational expert, Jerry D. Hardin, and opined claimant sustained a 77.4% task loss.

At the request of respondent, claimant was evaluated by Dr. Hendler on April 15, 2014. The doctor reviewed claimant's extensive medical records and conducted a physical examination. Dr. Hendler's report states claimant reported prior problems with muscles and tendinitis in his back and he had been in physical therapy for treatment of a strain, which he reported resolved within a week. Dr. Hendler indicated claimant's initial injury as it relates to the September 2, 2007, accident was a lumbar strain. The doctor noted claimant had a significant history of back disease predating his September 2, 2007, injury and had interventional treatment just two weeks prior to the accident.

Dr. Hendler testified claimant's September 2, 2007, accident "was not the cause of the problem that led the patient to require the surgical fusions and the stimulator placement."[8] He also stated in his report, "In my opinion, the surgery of February 8, 2008 was not reasonable and necessary for treatment of the September 2, 2007 work injury. Since all of the other surgeries arose from this surgery, none of them, in my opinion, was reasonable and necessary for treatment of the work injury of September 2, 2007."[9] However, when asked on cross-examination if he agreed surgery was performed in an effort to try to cure or relieve claimant from the effects of his work injury, Dr. Hendler testified, in part:

> I think it would be reasonable to conclude that whoever performed the surgery believed that this was to treat and cure -- I think those were your terms -- Mr. Hershberger, but I can't see anything to suggest based on the history that it would have been expected to treat and/or cure that injury.[10]

Dr. Hendler, using the *Guides*, opined that prior to his September 2, 2007, accident, claimant was in DRE Category III and had a 10% whole person functional impairment. The doctor indicated claimant sustained an additional 5% whole body permanent functional impairment as the result of his September 2, 2007, injury, separate and distinct from any additional impairment caused by his post-September 2, 2007, surgeries. Dr. Hendler

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[8] Hendler Depo. at 13.

[9] *Id.*, Ex. 2 at 5.

[10] *Id.* at 23.

opined claimant sustained a 21% whole person functional impairment, which would be the same, regardless of whether he had an impairment from the September 2, 2007, injury.

Dr. Hendler indicated claimant was not permanently and totally disabled. The doctor felt claimant could perform work in the light category of physical demand. At Dr. Hendler's deposition, a vocational assessment prepared by respondent's vocational expert, Steve L. Benjamin, was introduced as an exhibit. The vocational assessment contained restrictions imposed by Dr. Harris. Dr. Hendler testified that for the most part, those restrictions were consistent with his opinions regarding claimant's abilities. Dr. Harris' restrictions adopted by Dr. Hendler included not pushing/pulling 26 to 50 pounds frequently and 25 pounds or less continuously. Claimant was also restricted to occasionally bending, twisting, turning, kneeling and squatting and not continuously sitting. However, he differed with Dr. Harris on some restrictions. Dr. Hendler restricted claimant to lifting/carrying no more than 20 pounds occasionally, 10 pounds frequently and less than 10 pounds continuously. The doctor restricted standing and walking at a frequent level. Dr. Hendler indicated claimant could no longer perform 33 of 54 job tasks identified by Mr. Benjamin, for a 61.1% task loss.

Mr. Wedel testified he last saw claimant on June 17, 2014. Mr. Wedel opined claimant sustained a personal injury on September 2, 2007. According to Mr. Wedel, claimant did not have pain down both legs and heel numbness prior to his work accident. Mr. Wedel indicated that since claimant's accident, claimant cannot sit during an entire appointment. Mr. Wedel testified claimant was essentially and realistically unemployable and was permanently and totally disabled because he is unable to sit or stand for any length of time. Mr. Wedel indicated claimant has chronic and relentless pain and a side effect of his medications is drowsiness. Because of that, Mr. Wedel would caution claimant on driving or operating heavy equipment.

Claimant testified he currently takes Lyrica, Celebrex, Cymbalta, Trazodone, Pantoprazole and Tylenol on a daily basis. Claimant also indicated he uses Prednisone, Percocet and/or a muscle relaxant at night. He uses the spinal cord stimulator every morning. He testified that after his September 2, 2007, accident, he returned to light duty performing computer work and answering the telephone, but sitting caused pain in his buttocks, thighs, calves and feet. Claimant then stood to operate the computer. One day, his left leg failed to function and he fell, injuring his right knee.

Claimant testified the three back surgeries have helped his back and "It's not really an issue."[11] Claimant testified he has constant nerve pain in his buttocks and legs and numbness in his left foot and both heels. He cannot stand long and walking very far increases the pain in his buttocks and calves. He indicated he has difficulty sleeping at night because of pain. On a pain scale of one to ten, a good day for claimant is a four. A

[11] R.H. Trans. at 64.

bad day is a ten. He indicated he has one to two bad days a month. Claimant testified he spends six to 12 hours a day in a recliner.

Claimant retired on July 1, 2009, and testified he receives a monthly pension of approximately $1,900 per month. Claimant indicated that both he and respondent contributed to his retirement plan. Claimant also receives monthly Social Security disability payments of around $1,800 that he thought began in 2010. He has not worked since his accident. Since retiring from respondent, claimant has looked for office work and work as a driver. Claimant indicated his chief problems in obtaining employment are that he cannot do anything for a long period of time and he takes medications.

Mr. Hardin interviewed claimant on November 2, 2009, and again on February 6, 2014. Mr. Hardin also reviewed Dr. Fluter's March 6, 2013, report, but was not provided records from any other physician. Mr. Hardin testified claimant has been receiving Social Security disability benefits since December 2009. Based upon the restrictions imposed by Dr. Fluter, claimant's age, lack of education, lack of work experience except in a few specific areas, medication and pain, Mr. Hardin felt claimant was unable to obtain or perform substantial, gainful employment.

Claimant was nearly 60 years of age when he was interviewed by Mr. Benjamin on April 7, 2014. During the interview, claimant indicated he last applied for work during the week of March 31, 2014. Mr. Benjamin reviewed a copy of Dr. Harris' report, Mr. Hardin's report, the regular hearing transcript, claimant's payroll history and a job description. At Mr. Benjamin's deposition, claimant's attorney objected to Mr. Benjamin's opinions because using Dr. Harris' report violated K.S.A. 44-519 as Dr. Harris did not testify.

Mr. Benjamin testified that based upon Dr. Harris' work restrictions, claimant should be able to re-enter the open labor market. According to Mr. Benjamin, claimant should be able to earn approximately $380.10 per week. Mr. Benjamin testified he took into consideration claimant's past work, his skills, education, work restrictions, where he lives and how long he has been out of the open labor market. He indicated claimant, with Dr. Harris' restrictions, should be employable as a customer service representative, dispatcher, driver or security guard. On cross-examination, he agreed some employers would not hire an individual as a driver or security guard if they are taking narcotics.

Respondent's original terminal date was May 2, 2014. On May 27, 2014, a hearing was held on respondent's request to extend its terminal date, because claimant objected to the extension. At the hearing, respondent indicated it had scheduled the deposition of a human resources representative, but cancelled because documents containing claimant's wage and retirement information could not be sorted. Respondent's counsel

stated, "Subsequently we provided those documents to Mr. Hess and I submitted a stipulation."[12] The ALJ extended respondent's terminal date to June 27, 2014.

Respondent did not file a submission letter, but on June 27, 2014, its terminal date, filed the affidavit of Debra Perbeck, respondent's human resources director. The affidavit and exhibits thereto contain information concerning claimant's base wage, fringe benefits, overtime, voluntary wage payments made by respondent to claimant and contributions made by claimant and respondent to claimant's retirement fund. On July 2, 2014, claimant filed an objection to the affidavit and exhibits. The objection indicates respondent sent the information attached to the affidavit to claimant's attorney on May 2 and 23, 2014, asking claimant's attorney to stipulate to the information, but claimant's attorney declined. Claimant argued that despite the fact respondent's terminal date was extended, it did not depose Ms. Perbeck.

The ALJ, in the Award, granted claimant's objection to the affidavit, stating:

> The court further notes the presence of an affidavit in its file from Debra Perbeck. In what is captioned as a Stipulation Hearing that was held on March 4, 2014, the parties agreed that the Claimant's base wage was $907.42. A representation was made at that time that the Respondent would provide additional fringe benefit information. The affidavit submitted contains wage information, but it also contains retirement benefit information that was not contemplated as part of any wage stipulation. Claimant objects to the affidavit on that basis. The court sustains Claimant's objection and does not admit or consider any of the information contained in the affidavit. The court therefore finds that the Claimant's average weekly wage is $907.42.[13]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-501(a) states, in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[12] P.H. Trans. (May 27, 2014) at 6.

[13] ALJ Award at 4.

Personal injury by accident arising out of and in the course of employment

Respondent argues claimant failed to prove he sustained personal injury by accident. The Board disagrees. Respondent's brief acknowledges Drs. Hendler and Ebelke concluded claimant's injury of September 2, 2007, was a lumbar strain. A lumbar strain is a personal injury as defined in K.S.A. 2007 Supp. 44-508(e). Dr. Hendler, respondent's expert, indicated claimant sustained an additional 5% whole body permanent functional impairment as the result of his September 2, 2007, injury, separate and distinct from any additional impairment caused by his post-September 2, 2007, surgeries. Moreover, Dr. Fluter and Mr. Wedel opined claimant sustained a work-related back injury. The Board recognizes claimant had a preexisting back condition, for which he received medical treatment two weeks prior to his September 2, 2007, accident. However, claimant's testimony and the overwhelming medical evidence proves claimant more probably than not sustained a personal injury by accident arising out of and in the course of his employment with respondent.

Claimant's functional impairment

Dr. Hendler opined claimant had a 21% whole body permanent functional impairment with 10% preexisting, Dr. Ebelke, 20%, and Dr. Fluter, 25%. The ALJ apparently agreed with Dr. Fluter and found claimant had a 25% whole person permanent functional impairment. The Board finds the opinions of the three doctors equally credible and finds claimant sustained a 22% whole person permanent functional impairment.

The Board rejects the ALJ's analysis that the functional impairment opinions of Drs. Hendler and Ebelke have no credibility because they felt claimant's surgeries were not a natural consequence of claimant's accident and the doctors are "Monday morning quarterbacks."[14] The fact that Drs. Ebelke and Hendler felt claimant's surgeries were unnecessary does not render their functional impairment opinions unreliable.

Credit for claimant's alleged preexisting permanent functional impairment

K.S.A. 2007 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Claimant argues respondent failed to prove claimant had a preexisting functional impairment. The Board disagrees and finds claimant had a 10% whole body functional

[14] ALJ Award at 4.

impairment for his preexisting low back condition. Drs. Hendler and Ebelke reviewed claimant's pre-accident medical records. Dr. Hendler felt claimant had a 10% preexisting impairment and was in DRE Category III. The doctor noted claimant had a significant history of back disease before his September 2, 2007, injury and had interventional treatment two weeks prior to his accident. Dr. Ebelke was not asked if claimant had a preexisting functional impairment. Dr. Fluter opined claimant had no preexisting impairment if his back condition had resolved. Claimant, however, saw Dr. Black on August 16, 2007, two weeks before his accident, and was assessed with lumbar radiculopathy.

Exclusion of Steve L. Benjamin's testimony

K.S.A. 44-519 states:

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

In *Roberts*,[15] the Kansas Supreme Court stated:

> In the present case, the vocational rehabilitation expert is not qualified to express his own opinion regarding the medical evidence and must rely upon the opinions of health care providers in order to form an opinion. Therefore, his opinion merely reflects and expresses the medical opinions of absent health care providers. The holding of *Boeing* [*Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989)] appears to specifically bar this type of bootlegging into evidence, unless the evidence from the absent physicians is grounded on the opinion of a testifying physician.

The ALJ excluded all of Mr. Benjamin's testimony because his written opinions were based upon the opinions of Dr. Harris, who did not testify. Mr. Benjamin testified that based upon Dr. Harris' restrictions and vocational factors, claimant should be able to re-enter the open labor market. However, Mr. Benjamin testified on other matters such as his qualifications, claimant's age and that claimant had recently applied for jobs. Applying K.S.A. 44-519 and *Roberts*, Mr. Benjamin's opinions and testimony based upon Dr. Harris' restrictions are excluded. However, the Board does not exclude the remainder of Mr. Benjamin's testimony, or those parts of his report not based upon Dr. Harris' records.

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[15] *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 279, 949 P.2d 613 (1997).

Claimant is permanently and totally disabled

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[16]

In *Wardlow*,[17] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Dr. Ebelke was not asked if claimant has work restrictions or is permanently and totally disabled. Dr. Hendler indicated that with claimant's restrictions, he could perform jobs in the light category of physical demand. Dr. Fluter and Mr. Wedel opined claimant is permanently and totally disabled. The Board finds Dr. Fluter and Mr. Wedel's opinions are credible and more persuasive than those of Dr. Hendler.

Dr. Fluter, taking into consideration claimant's condition, nature of restrictions and need for management of chronic medications, some of which could impact his cognitive abilities and safety, opined claimant was not realistically capable of substantial and gainful employment. Mr. Wedel, who treated claimant on numerous occasions before and after his September 2, 2007, accident, observed claimant having difficulty sitting through

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[16] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[17] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

appointments and was aware claimant takes several medications and that he is in constant pain. Dr. Hendler's opinion does not take into consideration that claimant takes a narcotic pain medication, at least two antidepressants and is in severe pain.

Claimant, who has been receiving Social Security disability since December 2009, reported to Mr. Benjamin that as recently as March 2014, he applied for work. Claimant has been unable to find other employment. He has had three major surgeries and two surgeries to implant a spinal cord stimulator. Claimant testified he has constant nerve pain in his buttocks and legs, numbness in his left foot and both heels and uses the spinal cord stimulator every day. That supports a finding that claimant is permanently and totally disabled.

Claimant, since 1990, has worked primarily as an EMT, EMICT and firefighter and has limited work experience. Claimant is 61 years of age. His work restrictions prevent him from performing his job with respondent. The Board, taking into consideration all of claimant's circumstances as required by *Wardlow*, finds claimant is permanently and totally disabled because of his medical condition, medications, work restrictions, age and limited work experience.

The affidavit of Debra Perbeck

K.A.R. 51-3-5a(a) states:

> Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement. If medical reports are not available or have not been produced before the preliminary hearing, either party shall be entitled to an ex parte order for production of the reports upon motion to the administrative law judge.

K.S.A. 2007 Supp. 60-460 states, in part:

> Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> . . .
>
> (m) *Business entries and the like.* Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that (1) they were made in the regular course of a business at or about the time of the act, condition or event recorded and (2) the sources of information from which made

> and the method and circumstances of their preparation were such as to indicate their trustworthiness.
>
> If the procedure specified by subsection (b) of K.S.A. 60-245a for providing business records has been complied with and no party has required the personal attendance of a custodian of the records or the production of the original records, the affidavit of the custodian shall be prima facie evidence that the records satisfy the requirements of this subsection.

K.S.A. 2007 Supp. 44-523(a) states:

> The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.A.R. 51-3-8(c) states, in part:

> Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

Claimant cites the recent Board decision in *Steinmetz*,[18] which has been appealed to the Kansas Court of Appeals. In *Steinmetz*, the majority concluded:

> The Workers Compensation Act has been held to be complete and exclusive within itself in establishing procedures covering every phase of the right to compensation. Such procedures are not subject to supplementation by rules borrowed from the Code of Civil Procedure. [Footnote citing *Kelly v. Phillips Petroleum Co.*, 222 Kan. 347, 566 P.2d 10 (1977).] The Board finds the provisions of Chapter 60 of the Kansas Statutes Annotated are not applicable to matters brought pursuant to Chapter 44 unless specifically designated by the legislature or an appellate court. The dismissal provisions of K.S.A. 60-225 do not apply to a workers compensation proceeding.

K.S.A. 2007 Supp. 44-523(a) provides ALJs and the Board are not bound by technical rules of procedure and K.A.R. 51-3-8(c) states ALJs shall not be bound by rules of evidence. At first glance, that seems to support respondent's argument that Ms. Perbeck's affidavit should be considered part of the record. However, K.S.A. 2007 Supp. 44-523(a) also requires ALJs and the Board to give parties reasonable opportunity to be heard and to present evidence.

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[18] *Steinmetz v. United Parcel Service*, No. 1,009,382, 2015 WL 510326 (Kan. WCAB Jan. 22, 2015), *appealed to the Kansas Court of Appeals* (Feb. 17, 2015).

Respondent, on its terminal date, filed Ms. Perbeck's affidavit with the Division. By then, claimant had submitted his evidence and submission letter to the ALJ. Twice previously, respondent asked claimant to stipulate to the information attached to the affidavit, but claimant refused. Claimant should have the opportunity to cross-examine Ms. Perbeck. Allowing Ms. Perbeck's affidavit is akin to allowing her to testify without cross-examination. In essence, respondent is asking the ALJ and the Board to make the information contained in the affidavit and accompanying exhibits uncontroverted. Allowing the practice of filing last-minute affidavits such as Ms. Perbeck's could lead to the widespread denial of due process. The ALJ was correct in not admitting into evidence Ms. Perbeck's affidavit and attached exhibits.

As stated in *Steinmetz*, the Kansas Workers Compensation Act is complete and exclusive and its procedures are not subject to supplementation by the Kansas Code of Civil Procedure. Even if the Kansas Code of Civil Procedure applied, the Board questions whether affidavits similar to Ms. Perbeck's would be admissible as evidence.

Respondent's requests for a credit for voluntary wage payments made to claimant and for a reduction in his weekly benefits by the weekly equivalent of his retirement benefits pursuant to K.S.A. 2007 Supp. 44-501(h) are denied

Because Ms. Perbeck's affidavit is not part of the record, respondent has failed to prove its alleged voluntary wage payments to claimant and the amount it contributed to claimant's retirement plan. Accordingly, respondent's requests for a credit for voluntary wage payments and for a reduction in claimant's weekly benefits pursuant to K.S.A. 2007 Supp. 44-501(h) are denied.

Claimant's surgery on April 16, 2012, performed by Dr. Grundmeyer was not reasonably necessary to cure and relieve the effects of his work injury

K.S.A. 2007 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

Dr. Ebelke testified he would not have recommended a third surgery for claimant and explained in detail why the surgery was not necessary. Dr. Hendler was adamant that

claimant's surgeries were not reasonably necessary to cure and relieve the effects of his work injury. Dr. Fluter was not asked whether claimant's April 16, 2012, surgery was reasonably necessary to cure and relieve the effects of his work injury. The Board finds significant medical evidence shows claimant's April 16, 2012, surgery was not reasonably necessary to cure and relieve the effects of his work injury.

CONCLUSIONS

1. Claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent.

2. Claimant has a 22% whole person permanent functional impairment.

3. Claimant has a preexisting 10% whole person permanent functional impairment.

4. Only the testimony and opinions of Mr. Benjamin based upon Dr. Harris' records are inadmissable.

5. Claimant is permanently and totally disabled. Respondent shall be given a credit for the aforementioned preexisting impairment in accordance with *Payne*[19] using the following process:

A. $125,000 permanent total award less $35,555.80 paid in temporary total disability benefits equals $89,444.20 (remaining amount payable).

B. $89,444.20 less $21,165 (the value of the preexisting 10% whole body functional impairment)[20] equals $68,279.20 (the amount of permanent total disability benefits owed).

6. Ms. Perbeck's affidavit is inadmissable. Respondent's requests for a credit for voluntary wage payments and for a reduction in claimant's weekly benefits pursuant to K.S.A. 2007 Supp. 44-501(h) are denied.

7. Claimant's April 16, 2012, surgery was not reasonably necessary to cure and relieve the effects of his work injury.

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[19] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

[20] This figure represents the mathematical result of 415 weeks (the maximum weeks available for a functional impairment) x 10% (preexisting impairment) x $510 (weekly compensation rate).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[21] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the December 12, 2014, Award entered by ALJ Klein by finding claimant sustained a 22% whole person permanent functional impairment, claimant's April 16, 2012, surgery was not reasonably necessary to cure and relieve the effects of his work injury and respondent is entitled to a credit for claimant's preexisting 10% whole person permanent functional impairment. The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the foregoing.

Therefore, claimant is awarded 69.72 weeks of temporary total disability benefits at the rate of $510 per week, or $35,555.80, plus 133.88 weeks of permanent total disability benefits at the rate of $510 per week, or $68,279.20, for a permanent total disability and a total award of $103,835, which is all due and owing, less amounts previously paid.

The file contains an attorney fee contract between claimant and his attorney, but the ALJ did not address approval of the contract. Should claimant's counsel desire a fee be approved in this matter, he must seek approval of the contract from the ALJ.

IT IS SO ORDERED.

Dated this ____ day of May, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[21] K.S.A. 2013 Supp. 44-555c(j).

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Honorable Thomas Klein, Administrative Law Judge